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No. 07-299

In the Supreme Court of the United States

CARMILLA FUSSELL

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Eighth District Court of Appeals Cuyahoga County, Ohio

PETITION FOR WRIT OF CERTIORARI

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September 4, 2007

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER DUE PROCESS WAS DENIED WHEN A PROSECUTOR WAS EXPRESSLY ALLOWED TO ASK THE ACCUSED IF THE ARRESTING OFFICER HAD LIED IN HIS TESTIMONY, WHICH TESTIMONY PROVIDED THE SOLE BASIS FOR ANY POSSIBLE CONVICTION.

II

WHETHER AN ARRESTEE'S REFUSALS, AND HER EFFORTS TO SIMPLY IGNORE (*I.E, TO PASSIVELY RESIST, AS WAS SAID TO BE THE CASE*) THE OFFICER'S ATTEMPTS TO ELICIT HER COOPERATION IN CONNECTION WITH THEIR BOOKING PROCEDURES WAS CONDUCT THAT NOT ONLY FALLS WITHIN HER RIGHT TO REMAIN SILENT, BUT ALSO FALLS WITHIN THE AMBIT OF PROTECTED SPEECH.

III

WHETHER AN ACCUSED WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND A FAIR TRIAL, WHEN THE TRIAL COURT UNLEASHED AN UNDESERVED, SCATHING, REPROACHMENT OF COUNSEL FOR COMMENTING ON THE PROSECUTION'S FAILURE TO PRODUCE AN ADMITTED EYEWITNESS (A POLICE DISPATCHER) WHO WAS PECULIARLY AVAILABLE TO THE STATE AND LITERALLY UNAVAILABLE TO THE DEFENSE.

IV

WHETHER A VERDICT FINDING ONE GUILTY OF KNOWINGLY CAUSING AN INJURY IS SUSTAINED BY EVIDENCE SUFFICIENT TO SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT WHEN THE PROOF SHOWS THE ACTS OF THE FEMALE ACCUSED WERE AT BEST A REFLEX RESPONSE TO THE AGGRESSIVE PHYSICAL ACTIONS TAKEN BY A MALE OFFICER TOWARD A PERSON THAT HE OUTWEIGHED BY AT LEAST ONE HUNDRED POUNDS, AND THE INJURY WAS A SLIGHT SCRATCH TO THE FACE THAT WAS UNNOTICED UNTIL DISCOVERED SOME TIME LATER.

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Carmilla Fussell, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Ohio Court of Appeals for the Eighth Judicial District, originally journalized in this case on **January 10, 2007**, and made final by order of the Ohio Supreme Court on **June 6, 2007**, when the Court denied further Appellate review.

OPINIONS BELOW

The **Opinion** of the Supreme Court of Ohio, denying further appellate review is included in the Appendix as **Appendix, p. 1a**. The Order of the Ohio Court of Appeals affirming the conviction, centralized herein, is designated **Appendix, at p. 2a**.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment by the Court of Appeals was finalized on **June 6, 2007**. So postured, the jurisdiction of this Court is seasonably invoked under **Title 28 U.S.C. §1257(3)**.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principal Constitutional and Statutory Provisions involved are:

The First Amendment to the United States Constitution;
The Fourth Amendment to the United States Constitution;
The Fifth Amendment to the United States Constitution;
The Sixth Amendment to the United States Constitution;
Revised Code of Ohio, §2901.22(B);

Revised Code of Ohio, §2903.13;
Rule 29, Ohio Rules of Criminal Procedure; and
Rule 33, Ohio Rules of Criminal Procedure.

STATEMENT OF THE CASE AND FACTS

Carmilla Fussell, the petitioner herein, was arrested for traffic offenses. She was only driving because her escort was unable to do so. Literally, he was in no condition to drive. **(Tr., pp. 172-173.)**[1] As a prelude to the officer sustaining a token facial scratch the following events unfolded:

> A: The female dispatcher summoned me...the prisoner was not going to cooperate in giving her anything... [I] explain[ed] to the defendant that she had to be placed in a jail cell...She had to cooperate with us at this point.
>
> Q: Why is it . . . [she couldn't] just sit there . . .
>
> It's a booking room . . . *there's video cameras* [etc., these he purposely opted not to use].
>
> Q: What happened next?
>
> A: I tried to explain . . . what needed to happen, that she needed to cooperate with us so we could get her into a jail ~~cell~~ so that she could sleep or lay down because *at that point she would just keep her head on the table, she wouldn't communicate anything to us, she wouldn't say anything to us, she just basically ignored us*.

[1] The reference **Tr., pp. 172-173,** is to the "Transcript of Proceeding" before the Trial Court.

Q: *Passive resistance*?

A: *Basically, yes*. **Id., pp. 139-140.**

* * *

. . . I says, look, if you don't cooperate with us, *we're going to simply have to...just take the jewelry off ourselves... I told the dispatcher I would hold her...* she sprung to her feet...I gave verbal commands...not to be combative with us ...*I tried to escort her back to the bench*, told her to sit down....**Id., pp. 143-144. (Emphasis supplied.)**

This so-called victim testified he "may have come closer to her without necessarily touching her, but to emphasize to her that she needed to cooperate and sit down." Also, he rather forthrightly conceded that he moved in even "closer" and actually tried to put ". . . [his] arm on her shoulder to get her arm and try to get her to sit down on the bench" **(id., p. 144)**. It was in the wake of these unfolding events he tells us "she swung wildly to get me away from him" and this is when his face got this "scratch" **(id., pp. 145-147)**.

Postured by this self-serving spin Officer Duff would put on his testimony, it truly seems a bit overwrought to simply characterize Carmilla Fussell's actions, under these reflex-laden circumstances, as being assaultive. After all, she was locked in "a holding room" **(id., p. 153)**. When asked whether he was "hurting her," the officer's response was that he had to show her who was in charge. Significant here, according to this officer, one *can be required, i.e., literally forced, to answer booking questions*. **(id., pp. 163-164.)** The fact that the Court endorsed this nonsense is almost bewildering. Likewise significant here, this officer testified

that he opted against videotape recording the action centralized in this case. **(Id., p. 165.)**

Officer Meyerholtz, the other officer present, was specifically asked:

Q: What you saw was -- you heard first a struggle and when you came into the room he had her pinned up against the wall?

Q: *And did you see her punch Officer Duff*?

A: *I did not see her strike him, no.*

Q: *Do you know how that scratch got on his face*?

A: *No, I don't.*

Q: You didn't see her swinging at him, did you?

A: *She did not strike him at all while I was there . . .*

Q: It was some time later that you noticed that, hey let me get a camera and take a picture of this?

A: Correct.[2] **Id., pp. 177-178. (Emphasis supplied.)**

Despite this clear cut testimony, the Court of Appeals somehow was able to credit this witness with actually seeing Carmilla Fussell swing at the victim **(Appendix, at p. 12a)**. Even the victim did not say this had happened **(Post p.28)**.

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[2] The upshot of this testimony is that it shows Meyerholtz was present whenever it was that Officer Duff's face got scratched. It also verifies this alleged injury was actually less than *de minimus*.

Likewise, contrary to the Court's position, he never testified that she kicked at *anyone*.

II

Carmilla Fussell truly believed she was being physically mistreated. Her evidence shows her actions were not purposeful in the sense that she knew, or should have known, she would somehow (if she did) injure a fit officer who outweighed her by 100 lbs. Here, she testified:

> A: . . . So he told me I was going to be booked in and to start taking my things off . . . *I thought maybe with the female in the room he would leave, but he never left, so I never moved ... he said, well, since you're not going to move, I'll move for you and then he started to snatch my jewelry off.*
>
> And . . . when he grabbed my ponytail I kind of brushed his arm away. When I did that, he took my arm and forced it behind my back and it felt like he was trying to throw me to the floor and I didn't know what was really going on, . . . it was kind of difficult for him to throw me to the floor so he kind of was like slinging me around. . .
>
> *The lady officer was shouting calm down, calm down, Carmilla, calm down. And I was really standing there and he was kind of swinging at me trying to get me to the ground.* **Tr., pp. 188-189. (Emphasis supplied.)**

The events here were backgrounded by certain established facts. Simply put, these make it clear that the officer's actions were the product of over-zealous enforcement. Significant here, the officer's testimony, by and large, was

uncorroborated. Our reference here is to the following segment of this officer's testimony set forth elsewhere (***ante*, p. 2**). We say uncorroborated because the female officer, who was present throughout, did not testify. Also, the defense was literally prevented from emphasizing this compelling thesis in his peroration to the jury. This occurred on the basis of a ruling that simply cannot be defended. (***Post*, pp. 19-20.**) To fully assay the impact of this ruling, consider how much more effective the following argument would have been but for the Court's castigation of counsel for attempting to make certain valid points:

> . . . *She testified he never left the room. He testified that he did*. . . . They had the equipment there where they could have started photographing this. . . . *It just seems to me that they should have turned that tape recorder on. Videotape recorder*. . . . We wouldn't have to depend wholly and solely on the testimony of Mr. Duff as to what precipitated this incident or on the testimony of the defendant . . . . Now, she says that he started hurting her, grabbed her hair was trying to get her arm behind her, and obviously she didn't feel that was necessary, and it was hurting her. So in effect she's trying to protect herself from pain. Now, she's flailing her arms around. Now, the prosecutor talked about knowingly and he says . . . this is something that she should have known was going to happen. That if she was flailing her arms around . . . she should have known she was going to scratch his face. **Tr., p. 217**.

Simply put, the facts show there were three (3) officers present. All of whom, it can be said, aggressively participated in attempting to forcibly remove petitioner's jewelry. In so doing, it should be noted, the other officers

were doing as they were told. The bottom line, of course, is that in the wake of their efforts it was later learned that one of the officers, the alleged victim, had sustained what was termed to be a slight scratch on his face. No one knows when or how this occurred, or even if the petitioner did the deed.

III

With reference to the Opinion here being challenged **(Appendix, at p 20)**, the Court should understand several factual assertions relied on as major premises for very specific conclusions were not only flawed, they absolutely cannot be validated by the Record. Our first reference here is to the fact that despite Officer Meyerholtz's categorical testimony that he *did not* see petitioner strike at Officer Duff **(Tr., pp. 177-178)**, the Court somehow concluded that Meyerholtz "saw her swing at Duff." **(Appendix, at p. 1a.)** Here, as well, without any factual basis the Court assailed counsel with the statement:

> . . . defense counsel's argument to the jury that the State did not call the dispatcher because obviously they talked to her *and she would have testified differently than Officer Duff is completely unsupported by the record.* **Id., at p. 9a.**

Again, in all deference, there is absolutely nothing in the Record that justified the Court of Appeals, likewise, lambasting counsel as was done in the above quote. This follows because (the flawed notions of these Courts to the contrary, notwithstanding) counsel never stated the missing witness would have testified differently. Indeed the source of the nonsensical belief counsel had so argued is not merely quixotic, the notion itself is flawed almost beyond belief. For our part, the Court's thesis, which endorsed the prosecutor's

artificial elevation of the petitioner's assertion of her right of silence into proof of culpability, cannot be defended in law, logic, or with any sense of fairness. This is true all the more so because petitioner's First Amendment rights were also implicated in the trial Judge's egregiously negative comments directed at Counsel. (See **Post, pp. 17**.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Traditionally in the Anglo-American law, which is the predicate for all criminal laws in this country, one would think any State should be required to prove *mens rea* (guilty mind) to sustain a criminal conviction. In this sense, surely Carmilla Fussell should not have been convicted because, as put by the officer-victim, she engaged in "passive resistance" to being treated roughly (as she felt was the case **[Tr., p. 140]**). So postured, it could not be any clearer that her fingernail (if it did) could only have accidentally[3] scratched the officer's face. And this, after he initiated physical conduct towards her. Indeed, there was no testimony by anyone that our petitioner swung at the officer or did anything other than *passively* resist. And, given the State's theory that supposes it was a fingernail that caused the minor scratch, one has to wonder what caused the State to even charge her with committing a felonious act. Here, as well, at least one thing is certain, counsel-opposite has conceded:

> ...it's not a big injury no we're not saying it is...She acted knowingly. Again we're not saying it was a

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[3] It was never contended Carmilla Fussell intentionally scratched the officer's face (**Tr., pp. 208-209**). Thus, it could only be, since her actions were not intentional, that she acted "reflexively" not "knowingly." (**Revised Code of Ohio, §2901.22[B].**)

conscious deliberate effort to do it, but she had to be aware . . . **(Id., pp. 208-209.)**

Now, we readily concede the word "knowingly" could involve an action that was done without any discernable or provable intent. Indeed, arguably, it could include a situation where the effect could not even have been imagined as being a possible consequence. On the other hand, the proof here simply failed to show that Carmilla Fussell *knowingly* caused this trifling injury.

ARGUMENT NO. I

DUE PROCESS IS DENIED WHEN A PROSECUTOR IS ALLOWED TO ASK THE ACCUSED WHETHER THE ARRESTING OFFICER LIED IN HIS TESTIMONY, THE SOLE BASIS FOR ANY CONVICTION.

Here, the facts are straight forward. The prosecutor was expressly allowed to ask the accused:

Q: *And it's your testimony that he never left the room, like he told us* he left you with a dispatcher, a female dispatcher?

A: *He never left the room.*

Q: And that is your recollection?

A: Yes.

Q: *So Officer Duff then lied to this jury*?

MR. WILLIS: Objection.

THE COURT: Overruled.

A: Yes.

Q: He did?

A: (Nods head.)

THE COURT: *You have to answer out loud*[4] *for the court reporter.*

THE WITNESS: *Okay. Yes.* **Id., pp. 196-197** (*Emphasis supplied.*)

Significant here, defending the questions put to the accused (that forced her to choose between literally *recanting* her own testimony and calling the officer a liar), counsel ignores several cogently compelling realities. These in turn were accentuated by the Court's open endorsement of them. Yet, counsel obviously persuaded the Court of Appeals that his having resorted to this sophomoric tactic really was consistent with Ohio law and is the way we do things around here. Indeed, if it were otherwise, surely counsel would have at least conceded that none of the Ohio cases he relied on addressed the issue as it is postured by the facts here. Clearly, as well, counsel ignored the fact that this case involves more than the usual credibility issues. These arise when there is a routine credibility conflict in the testimony of

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[4] Whether intended, or not, the Court's unnecessary intervention at this point "gilded the lily" - - at the petitioner's expense. The "gilding of the lily" concept, traceable to Shakespeare's **King John, *Act IV, Scene II***, is especially apt here since there was no need, as the Record shows, for the Court to garnish this testimony.

two witnesses in their descriptive versions of an event. Clearly this was not the case here. *The only possible explanation for the conflict is one of the parties has to be lying*.

For what it is worth, counsel-opposite's almost arrogant penchant for literally pontificating reached a sort of zenith in his responses to the arguments in this segment of our contentions. Indeed, we were actually told (as though it is the law somewhere, and particularly in this case) that it is perfectly proper for the Court to require a defendant, while testifying in their own defense, to comment on the veracity of any witness who accused him (or her) of wrongdoing. And this despite the fact that it is beyond dispute that determinations of credibility are for the jury, not for witnesses. So postured, it is compellingly indisputable that the petitioner was literally required to castigate her accuser as being a liar or recant her sole defense. While this alone was bad enough, given the trial Court literally advised the jury that the questions that asked her to do so were proper, there is, and was, no way the accused could ever overcome the Judge's flawed ruling. What this proves, as counsel seems clearly not to understand, is that the province of the jury was invaded by these assailed questions - - the answers to which devastated petitioner's credibility.

Even this is not all. It is undeniable questions of this ilk have absolutely no probative value. In addition, they are egregiously improper and argumentative. This follows because they do absolutely nothing to assist the jury in assaying the witness' credibility in its fact finding mission. Also, the authorized *questions*, as put in this case, artificially created the substantial risk that the jury would (as it arguably did) conclude that to acquit they had to find that the officer actually lied. This risk, we submit, was especially acute here

since what evolved was a swearing contest between a police officer and the accused - - a contest the accused almost always loses. This follows because most jurors believe (without reason in this counsel's judgment) that these law enforcement officers deservedly possess heightened degrees of credibility, which simply is not so.

Obviously, it is no mystery why it is so egregiously unfair to force a criminal defendant to choose between "recanting or calling a law officer a liar." See **U.S. v. Fernandez, 145 F. 3d 591, at 64 (1st Cir. 1998)**. Also see **U.S. v. Sanchez, 176 F.3d 1214 (9th Cir. 1993)**, where it was viewed as misconduct for the prosecution to even ask a witness whether a U.S. Marshall was a liar. The similar question asked here was not only calculatingly misleading, it was also argumentative.

Again, the law is clear. If possible, the State can impeach the accused's credibility. However, the State certainly does not deserve to be assisted in this effort by the trial Court's open endorsement of devastatingly bad questions of this ilk. Asking these questions represented a calculated move that was directed to the heart of Carmilla Fussell's defense, her credibility and her attorney's effectiveness. Here, counsel is reminded of what was once said by a sage from a bygone, but enlightened, era who wrote: "while [a prosecutor] . . . may strike hard blows, *he is not at liberty to strike foul blows.*" **Berger v. U.S., 295 U.S. 78 (1935)**.

Now, in this case one other thing is likewise clear. Any prejudice that emerged, inexorably or otherwise, was aggravated by the fact that in order to maintain her innocence Carmilla Fussell was undeniably impelled to call this officer a liar. This happened although it is beyond dispute that the accused's (or any witness') assessment of another witness'

credibility is truly irrelevant. For sure, the questions as put to the accused (augmented as they were by the Judge's endorsement) indisputably distorted the jury's evaluation of the credibility of the witness who gave conflicting testimony. See **U.S. v. Richter, 826 F. 2d 206 (2nd Cir. 1987)**, where the mere asking of a question of this ilk was misconduct.

ARGUMENT NO. II

AN ARRESTEE'S REFUSAL TO ANSWER QUESTIONS, AND HER EFFORTS TO SIMPLY IGNORE (*I.E.*, TO PASSIVELY RESIST) THE OFFICER'S ATTEMPTS TO ELICIT HER COOPERATION IN CONNECTION WITH THEIR BOOKING PROCEDURES WAS CONDUCT (AS WELL AS AN ACT) THAT NOT ONLY FALLS WITHIN HER RIGHT TO REMAIN SILENT, BUT ALSO FALLS WITHIN THE AMBIT OF PROTECTED SPEECH.

Here, the Court in rejecting the above thesis wrote:

> *. . . The prosecutor's questions about Fussell's refusal to answer these booking questions were proper and Duff's testimony about Fussell's behavior* (*e.g.*, putting her head down on the table, ignoring him, refusing to take off her jewelry) *was admissible into evidence.*[5] Accordingly, we find no violation of Fussell's right to remain silent.

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[5] Clearly, the fact that petitioner had, as the witness testified, sought to ignore them (**Tr., pp. 143-144**), shows their behavior toward petitioner could very well have been a response to her exercising her right to remain silent.

Appendix, at p. 8. (Emphasis supplied.) Simply put, we contend this ruling cannot survive meaningful scrutiny. This assailment is augmented by the further fact that the constitutional prohibitions referred to above, which are impervious to being trumped by any local procedure, were augmented by the fact that the evidence itself was not relevant. Equally inapt was the Court's references to **Pennsylvania v. Muniz, 496 U.S. 694 (1990) (Ibid.)**

The above thesis is further augmented by the fact that at all times the petitioner had a right to remain mute (or silent). And, with this being so, it follows due process was denied when the trial Court barred counsel from making this very precise, and inconfutable, point for the jury in an effort to correct (or at least dilute) a truly false impression given the jury. Given the fact (at least arguably) that the trial Court's rulings were indisputably erroneous, it follows that the petitioner was prejudiced. Indeed, given she had an absolute right that was traversed here **(Tr., pp. 136 & 181)** -- her due process rights were violated.

In the wake of **Doyle v. Ohio, 426 U.S. 610 (1976)** and **Miranda v. Arizona, 384 U.S. 436 (1966)**, an arrestee literally cannot be required to surrender their right to remain silent (or mute). **(Tr., pp. 133-135 & 139-140.)** Yet, the evidence here is clear. The officer testified that petitioner sought to ignore them **(ibid)**. It is also worth noting that the facts here indelibly show the jury was compellingly advised this was not only so, but is what propelled the officer into action. Indeed, he so testified (***ante*, p. 2**). It was this evidence that was punctuated by the Court's florescently decisive ruling that improperly advised the jury Carmilla Fussell was indeed *required* to surrender rights guaranteed her by the **Fifth Amendment** at the booking window, and she had refused to do so. **(Tr., pp. 133-135 and 139-140.)** In

our judgment, the positions taken by the Ohio Courts to the contrary, notwithstanding, the *questions sought to be asked*, and the *argument sought to be made in response thereto by the defense*, were indisputably rendered (in the wake of this scenario) relevant thereby in all respects. Simply put, it could not be any clearer that the Court's rulings fully and convincingly communicated to the jury the truly false idea that defense counsel was dead wrong on the law. This follows because the reverse is indisputably true: Carmilla Fussell was not *required* to surrender her right to remain silent at the booking window. And, for sure, she could not be penalized for having done so.

Even this is not all. Indeed, some of us understand "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at the police." (**Houston v. Hill, 482 U.S. 451, at 461 (1987)**. What this means is that whether Carmilla Fussell could properly refuse to surrender any of her First and Fifth Amendment rights, even at the booking window, was a matter of no mean significance. If nothing else then, it is beyond dispute that her refusal to respond, or submit, to the booking questions and procedures was absolutely irrelevant to her guilt or innocence. To be sure, whether she was indeed *required* to respond, as Officer Duff testified (**Tr., p. 164**), and as our prosecutor indicated she was, transformed the argument *that this was not so* into a relevant contention. Thus, her right to the assistance of counsel and due process were impermissibly diluted.

In our judgment, the prosecutor's use of petitioner's "passive resista[nce]," her post-**Miranda** statements and acts, as well as, certain aspects of her asserted conduct, as substitutes for proof of guilt violated principles that distill from **Doyle v. Ohio, 426 U.S. 610 (1976)**, and its progeny. Here, the facts are indeed clear. The accused was under

arrest in the booking area of the police station. What happened there occurred in the wake of certain events that included her efforts, as put by the officers, to "passive[ly] resist[ ]" (***ante*, p. 2**) being physically forced to submit to being booked in a certain manner. Here, it is worth emphasizing again, the events centralized in this case were all precipitated, and indeed unfolded at this point.

Significant here, in **Doyle**, it was held that the due process clause can be said to prohibit the use of an arrestee's post-**Miranda** silence to impeach their testimony. Indeed, the **Doyle** court noted that silence in the wake of the **Miranda** warnings was not necessarily probative because it is "insolubly ambiguous." **Doyle, 426 U.S., at 617**. With this being so, if nothing else is clear, it is truly beyond dispute that petitioner's refusal to remove her jewelry (if indeed such truly was the case) would not justify her being victimized by any deliberate infliction of pain. Additionally, it is likewise clear here that Officer Duff's admitted motivations - - *i.e.*, to remove her jewelry (**Tr., pp. 143-144**), at least arguably casts considerable doubt on his self-serving version as to how, and when, he got scratched. This is a reference to the mark on his face that had to be called to his attention sometime after it appeared. (**Id., pp. 177-178.**)

So postured, a dispositive matter to be reckoned with turns on whether the officer was entitled to use painful force to gain compliance with orders given to petitioner, supposedly in connection with the department's booking procedures. A further question asks: was petitioner's *passive resistance* (as was said to be the case) relevant to whether or not she knowingly caused the *scratch* to the officer's face (unbeknownst to the officer or her) that showed up later?

Given our petitioner's *passive resistance* was not merely lawful, but was protected by the First Amendment, it follows that to the extent it can be regarded as speech (**Duran v. City of Douglas, 904 F. 2d 1372 [1990]**), these officers also lacked the power to punish her for exercising that right. Even this is not all, given there was no testimony that the accused had posed a safety risk to herself, or anyone else and also given the offense for which she was arrested was a "non-violent" one, these facts as well are significant.

Here, our concentration is truly magnified by the fact that the Court below allowed itself to be convinced by the State's misreading of this Court's Opinion in **Muniz** - - referred to above. Both have clearly miscomprehended the Opinion's concern as to whether statements elicited during booking procedures were outside the ambit of **Miranda**. As we read the case, the focus was on whether there was an exception to **Miranda's** coverage for routine booking questions, *i.e.*, questions that solicit "biographical data necessary to complete booking or pretrial services." (**Id., at 601**.) Thus, it cannot possibly be said that (as our Court concluded) the booking exception, validated in **Muniz**, repudiated our contentions. In our view only one who has misread **Muniz** could possibly believe, as did the Court below and counsel-opposite, it actually held that a person being booked can be compelled to abandon their right of self-incrimination.

On this point consider as we were told by Carmilla Fussell, she described the reflexive actions she engaged in as an instinctive response to the actions directed toward her by the officers, one of whom (the alleged victim) opined she became agitated with them. (**Tr., p. 156**.) He said that although he put his hands on her, *he* did not believe that the effort hurt her in any way. (**Ibid**.) Likewise significant here, this officer's avowed purpose, we were told, was to take her

jewelry off of her because it was part of the booking procedure. **(Id., p. 158.)** Given we cannot exclude the possibility that the officer was hurting her, as she says was the case, there is no way the State should have been able to exploit this situation to our petitioner's detriment. And this after defense counsel was barred from making the arguments that: (1) her remaining passive and uncommunicative at the booking window was perfectly alright; and (2) she was under no obligation to even submit to their questions.

ARGUMENT NO. III

PROHIBITING DEFENSE COUNSEL FROM COMMENTING ON THE STATE'S FAILURE TO PRODUCE AN EYE-WITNESS (WHO WAS PECULIARLY AVAILABLE TO THE PROSECUTION) IN A RULING PUNCTUATED BY A TRULY UNDESERVED, SCATHING REPROACHMENT OF COUNSEL DEPRIVED THE ACCUSED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL.

A party's failure to utilize a witness (here, an eye-witness to literally *all* of the critical events in the case), who was peculiarly within its power to produce, and whose testimony would elucidate the events, gives rise to an inference that the witness' testimony would have been unfavorable. For sure, the facts here show the State inexplicably, and indeed boastfully, failed to produce this witness **(Tr., p. 224)**. It is this fact that arguably created the permissible inference that her testimony would have been unfavorable to the State. The cogency of this thesis lies in the fact that it raises the spectre that there was something fishy about the fact that the officers could videotape our petitioner out on the highway, as they did, but failed (if such really was the case) to utilize the

elaborate equipment that would surely have captured the critical scene involved in this case **(Tr., pp. 165-166)**. Of course, it is counsel's considered view that we were given an unlikely story about why this was not done. **(Id., p. 224.)** Our belief is that the events were videotaped and destroyed - - for obvious reasons. Thus, it only makes sense that we had every right to argue the State's case was made less compelling when the dispatcher became a missing witness. Given the efficacy of the argument counsel sought to make, no one can justify his being rebuked by remarks that improperly advised the jury that counsel was out of bounds. With this being so, it follows the petitioner was prejudiced.

Here too, it is worth emphasizing that the Court accused counsel of, in effect, testifying and testilying, *i.e.*, providing false information as an unsworn witness. Undeniably, the Court's statement must be viewed as telling the jury counsel was rightly admonished for being outside the Record. **(Id., p. 212.)** Surely, this extreme *sua sponte* reproachment perforce impaired counsel's effectiveness:

> MR. WILLIS: ...if it had been my responsibility to prove this young lady was not guilty, I certainly would have brought her back, but I wouldn't have brought her back before I talked to her, but *they obviously talked to her because I don't know when she left this area [and they know she left] . . . the only thing we know for sure is she's not here* -[6]

[6] Given counsel opposite also told the jury the witness had departed the area, and even insinuated he could have called her **(Tr., p. 224)**, surely the comments made by defense counsel did not deserve censure.

THE COURT: Wait a minute. Don't testify.

MR. WILLIS: *I'm not testifying.*

THE COURT: There is no evidence that they talked to her. *Don't testify, Mr. Willis. Please stick to the evidence....*

Ibid. (Emphasis supplied.) Clearly, the contention made is that: whether intended or not, the Court's comments, were of such character the jury would naturally and necessarily regard them as showing the Court's belief counsel should be condemned for engaging in unprofessional, if not unethical, conduct. With this being so, the Court below was required to look at the context in which the trial Court's comments were made and to actually articulate a finding, not only as to whether the Court's comments were justified but as to whether they were prejudicial. This follows because their impact on the jury is beyond dispute.

Because of the emphasis placed on the trial Court's castigation of trial counsel, for what we consider voicing a cogently valid argument (***ante*, pp. 19-20),** - certain segments of the appellate court's Opinion really say it all. Here, the Court likewise berated defense counsel argument as obviously erroneous, misleading, and not supported by any evidence. (See **Appendix, at p. 9a.**)

As to the validity of these gross and indefensible assailments of counsel, it should be understood that nowhere in the Record can anyone find where defense counsel ever stated the missing witness' version of what happened "differed from that of Officer Duff". Yet, despite the unassailability of the above declarations, it is worth repeating

what the Court of Appeals nonetheless wrote, while endorsing this nonsense. Here it was asseverated:

> . . . The only testimony regarding the dispatcher's whereabouts came from *Officer Duff, who testified that she had remarried and left the department. **There is no evidence whatsoever in the record that the prosecutor or anyone else had ever spoken with the dispatcher, much less determined that her version of what happened differed from that of Officer Duff.*** Accordingly, defense counsel's argument to the jury that the State did not call the dispatcher because 'obviously they talked to her' and she would have testified differently than Officer Duff was completely unsupported by the record. Therefore, the trial court did not err in admonishing defense counsel that he could not make such an argument to the jury. **Ibid.**

In all deference, it was disingenuous for the Court not to include Officer Duff, as falling within the ambit of our use of the word "they." Again, the record does not show counsel ever said, as the Court declared, this missing witness "would have testified differently from Officer Duff."

Granted, counsel is not infallible, but neither are judges. Thus, one has to wonder how it could be said, as the Court did, that *no one* identified with the prosecution "had ever spoken with the dispatcher." (**Ibid**.) Simply put, the fact that Officer Duff was asked to testify as to her whereabouts confutes the Court's categorical statement that no one had talked to this absent witness. And for that reason counsel deserved being rebuked.

Of course, contrary to the central thrust of the Court's excoriation of counsel, his remarks were not testimonial.

Indeed, the appellate Court itself noted that "Officer Duff" had told the jury the witness had remarried and left the area. **(Appendix, at p. 9a.)** Doubtlessly, someone told Officer Duff this. And, arguably the jury was told this to dull any expectations they may have had that they would be hearing from her. Also, the *prosecutor* himself took responsibility for the witness' absence. **(Tr., p. 224.)** The question then is easily put: how could defense counsel be berated for responding to this relevant evidence? Another question is: could the Court do this with impunity?

Again, it should be understood the compellingly formidable inference that counsel had sought to raise, in his aborted "missing witness" thesis, was indisputably warranted. *See* **U. S. v. Frost, 914 F. 2d 756, at 765 (6th Cir. 1990).** Here, another point to be noted is that because the Court acted *sua sponte* (as the Record shows she did), our belief is that her brusque intervention (***ante*, p. 17**) could only have negatively influenced the jury as to counsel's ethics. Also, the Court's spontaneous ruling, which was not solicited by the State, could very well have communicated a deep skepticism, or outright disbelief, by the Court in the worthiness of the accused's case.

Counsel is, of course, aware that there is an enforceable prohibition against courts (**State v. Thomas, 36 Ohio St. 2d 68 [1973]**), prosecutors (**State v. Willard, 144 Ohio App. 3d 767 [2001]**), as well as, defense attorneys, going outside the Record in making statements that are capable of influencing the jury. Also see **State v. Thomas, 33 Ohio App. 2d 882 (8th Dist. 1973)**. Given it cannot be shown the argument the defense sought to make was not a proper one, it follows then that the Court's devastating move against counsel simply was not deserved. Thus, the jurors could very well have decided that the Court's gratuitous condemnatory remarks in putting

counsel down were an indication that counsel had deliberately made the attempt to improperly smuggle compellingly false facts into the Record.

The upshot of the trial Court's stern condemnation of counsel, for making what was implausibly said to be an improper and impermissible argument, makes for an issue here of constitutional significance. This follows because of the crucial role the missing witness played in the actual development of the facts in this case. To begin with, the jury was only told that she moved out of the State. **(Tr., p. 224.)** Contrary to the Court's flawed notions, it is obvious the witness had communicated this information to someone connected with the prosecution of this case, or Officer Duff never would have been able to tell the jury she "departed" from here **(ibid)**. Either this or we have to suppose (as the Court below did) that the officer's testimony that this was so was pure speculation, or was a feat of mental telepathy. If the former, it was a product of engineering. If the latter, the jury was given the benefit of a miraculous feat.

The flip side of all this is that the Record does not bear out (because it did not happen) that counsel argued this missing witness "would" have "testified differently than Officer Duff." **(Appendix, at p. 9a.)** Again, no such argument was made. So postured, the Court's determination that an argument which was not made is "completely unsupported by the Record" **(ibid)** is beyond challenge. This is especially so in the wake of the *prosecutor's* concession to the jury on this subject. Here, the jury was told she had *departed* from Middleburg Heights and he insinuated that *he could have called her*. **(Tr., p. 224.)** If nothing else, it is most significant the Court did not accuse him of testilying, an accusation indefensibly leveled at defense counsel.

Of course, one difference surely is that the prosecutor certainly knew more than did counsel. He merely told the jury the only thing he knew for certain was that the witness was not here. It was this remark that caused the jury to *sua sponte* curse him out, *figuratively*. Now, there is an old adage that says what is good for the goose is good for the gander. The only other thing counsel knows for sure is that he is convinced the argument he made fit within due process parameters. And, counsel is convinced that our petitioner paid a price in the wake of the entire episode.

Indeed, given the fact that counsel for the State actually told the Court about the witness having "departed" this area, while acknowledging he had not elected to call her (**ibid**), makes for facts relevant to whether counsel deserved to be censured in the presence of the jury - - as he was. For what it is worth, although counsel rightly could claim a point of personal privilege, the absolute fact is that counsel was, of course, aware of Officer Duff's testimony (referred to above) and still believes his testimony shows the witness had obviously talked to someone connected with this case. Significant here, in the wake of the Court's remarks that accused defense counsel of testilying, the appellate court's Opinion is quite compelling. This follows because several of its major premises are false.

To be sure, it is worth repeating here that while it is said in the Opinion that officer Meyerholtz "saw her swing at Officer Duff" (**id, at p. 12a**), the fact that this categorical statement cannot be squared is indisputable. Indeed, when asked did he see her punch at Officer Duff, his testimony, which was clear and unambiguous, was that he did not see her "strike at him while he was there" (**Tr., pp. 177-178**). These points are magnified in the wake of certain statements made

by counsel-opposite (in his Appellate Court Brief, at p 4), which arguably supports our thesis. Here counsel stated:

> "in appellant's fourth and fifth assignments of error she contends her right to a fair trial was circumvented when counsel claimed that a witness that was not called would have had a different version." Tr. 211. Moreover, counsel went even further and claimed that the prosecution [o]bviously they talked to her...." Tr. 212. *Officer Duff testified that this dispatcher remarried and left the department.*

Granted, no one can dispute that the police dispatcher undoubtedly could have shed much needed light, a great deal of light — if you please, on matters that were in dispute. And, if her evidence was adverse to the State's case in any critical aspects the verdict could very well have been different. Stated another way, the missing witness, who was working for the police department could have *elucidated* the critical episode. And, clearly the missing witness was peculiarly within the power of the State to produce.

ARGUMENT NO. IV

A VERDICT FINDING ONE GUILTY OF KNOWINGLY CAUSING AN INJURY IS NOT SUSTAINED BY EVIDENCE SUFFICIENT TO SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT, AND IS CONTRARY TO LAW, WHEN THE PROOF SHOWS THE ACTS OF THE ACCUSED WERE AT BEST A REFLEX RESPONSE TO AGGRESSIVE PHYSICAL ACTIONS TAKEN BY THE MALE OFFICER TOWARD A FEMALE HE OUTWEIGHED BY AT LEAST ONE HUNDRED POUNDS.

The issue at the heart of this prosecution, indeed the dispositive issue, turns on whether the State proved our petitioner actually *knew* what was said to be **(ante, p. 2)** her *passive resistance* would cause the superficial scratch that the officer sustained **(Tr., p. 274)**. **(Revised Code of Ohio, §2901.22.)** Here, one thing is clear. Any knowledge Carmilla Fussell may have had was the most material issue the jury had to resolve. Granted then, her knowledge was the chief component of the charged offense. However, knowledge differs from physical objects and other phenomena. For here we are talking about one's "state of mind." And, like belief or consciousness, it cannot be seen or otherwise directly observed. However, where the person says she did not have such knowledge, it can only be proven by circumstantial evidence.

First off, in dealing with the statutory definition of the word "knowingly," what is significant is the lack of any meaningful explanation of what it is that criminalized certain conduct without imposing a *mens rea* requirement. Here, of course, the definition of "knowingly," is statutorily defined, but, even here we must reckon with the fact that the statute

itself (**§2901.22[B]**) must be construed "in the light of the background rules of the common law in which the requirement of some *mens rea* for a crime is firmly embedded." **Staples v. U.S., 511 U.S. 600, at 605 (1994)**. Clearly, as well, it is a fundamental principle that a person is not criminally responsible unless "an evil meaning mind" accompanies an "evil doing hand." **Morrisette v. U.S., 342 U.S. 246 (1952)**.

Obviously we are here talking about the concept of "scienter" and this in the sense of whether Carmilla Fussell, knew the acts shown to have been committed by her would result in the officer's face getting scratched. The question then is: when looking at the acts, "knowingly" committed by her, through her lens, can it be said she actually knew the officer would be scratched by her - - if he was?

Now, in this case, clearly the one statement that must be reckoned with was made by the alleged victim, this 230 lb. officer. The statement referred to was that when he tried to forcibly get her to "sit down ... *she swung wildly to get me away from her.*" **(Tr., pp. 144-145.) (Emphasis supplied.)** Postured by this categorical testimony, our contention is that these facts surely do not show Carmilla Fussell "knowingly caused or attempted to cause," physical harm to the officer. Here, the Court is referred to the case of **In Re: A.C.T., 158 Ohio App. 3d 473 (2nd Dist. 2004)**. There another Appellate Court was credited with having "found that the required mental state of knowing that the push [made against the teacher] might cause injury was not proven." Also see **In Re: Mark M., 2000 WL 1258000 (Ohio App. 6th Dist. 2000)**, and **In Re: John Freeborn, 2000 WL 1533 (Ohio App. 5th Dist. 1999)**. In **Freeborn**, a teacher had received flailing blows from a student she sought to restrain. It was what occurred did not rise to the level of "knowing" **(ibid)**.

Again, we should not overlook the fact that the officer has forthrightly admitted he put his hands on petitioner first. And, even more importantly, nothing disputes petitioner's testimony that she acted, albeit defensibly, reflexively. Actually, Officer Duff's testimony really says it all:

> Q: ...so she was swinging at you and *her fingernail hit you, and she was obviously trying to slap you, right*?
>
> A: *That's a good inference*.
>
> Q: In other words, she was going to attack a person who weighed twice as much as she does *by slapping him around, is that it*? . . . *You didn't say she came at you with her fist doubled up, did you*?
>
> A: No. **(Tr., p. 160.) (Emphasis supplied.)**

Here, the Court is being reminded that it recently dealt with the mental element of "knowingly" in the case of **Anderson v. U. S., 544 U.S. 696 (2005).** There, this Court reasoned the word "knowingly" is normally associated with the accused's awareness, understanding, or consciousness of their action. And, it was said that so postured the *mens rea* required for a conviction required proof applied to all the words that followed its use as an accusation.

With this being so, clearly then, given the testimony by Officer Meyerholtz that the alleged victim was unaware he had this slight scratch until it was called to his attention sometime later, at most it arguably occurred in the wake of his struggle with a person he described as "passively resisting" (***ante*, p. 2**.) Thus, it follows that any conclusion the petitioner "knowingly" scratched his face, under

circumstances where the officer did not know it had even occurred, can not survive meaningful scrutiny.

Another critical point here seems clearly to be that if, as this Court recognized in **Anderson** that if the ". . . defendant lack[ed] knowledge that his actions . . . [were] likely to affect the judicial proceedings . . . he lack[ed] the requisite intent to obstruct" (citing **U.S. v. Aguilar, 515 U.S. 593, 599 [(1995)]**, then clearly absent proof our Petitioner had knowledge her passive resistance could result in the officer receiving a minor scratch should mandate the same result.

Most significant here, this Court has recognized, indeed in **Anderson, 544 U.S., at p. 705**, that *knowledge* and *knowingly* are normally associated with "awareness, understanding or consciousness." With this being so, the alleged victim's lack of awareness that he had even been scratched is clearly significant. Given it was because of the trickle of blood that appeared later that signaled Officer Duff's fellow officer as to the scratch on his face. The question then arises as to how Carmilla Fussell was supposed to know the injury had occurred. Stated another way, where is the proof she had knowledge of the alleged event after it had occurred? Better yet, how can it be said that she should have known it would occur and thus acted *knowingly*?

CONCLUSION

In all deference, certain express findings made by the Court below are indeed baffling. Clearly, some were made without regard to the law or actual testimony. Given the Court actually found in favor of the State on the sufficiency issues the way it was done likewise hardly makes sense in view of **Ohio, Rule 29 (C), *Ohio Rules of Criminal Procedures.***

Hopefully, the various segments of the trial Record cited above will amplify the need here that counsel opposite should specifically respond to the serious accusations made therein. For clearly it is being said that a due process violation occurred when the appellate court premised critical segments of its resolution of the due process issues on the basis of truly flawed assessments of the Record. Of course, our hope is that ultimately this Court will correct what is so easily shown to have been egregiously flawed assertions that were artificially elevated into factual premises for several of the appellate Court's dispositive reasoning patterns. Indeed, our real concern with the Court's central thesis as to when and how the officer sustained what appears to be the slight scratch on his cheek evolves from the fact that it lacks any factual support whatsoever. The event was not so described by the officer. Indeed, the testimony of Officer Meyerholtz clearly shows that he called the scratch to Officer Duff's attention when he noticed a trickle of blood on his face. **(Tr., pp. 177-178.)** This awesome fact belies the position taken by the Courts below.

Also of interest, it is beyond despite there is no testimony that anyone kicked (or even "kicked at"). Despite this insuperable fact, the Opinion writer saw it otherwise. With this being so, the absence of any testimony that Carmilla Fussell did any kicking is rather compelling -- at least to some of us. This follows because one has to wonder why this was even said by the Court. Hopefully, Counsel Opposite will make it clear to us.

Respectfully submitted,

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APPENDIX

APPENDIX A

THE SUPREME COURT OF OHIO

Case No. 2007-0348

[Filed June 6, 2007]

STATE OF OHIO	)
	)
vs.	)
	)
CARMILLA FUSSELL	)
	)

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Cuyahoga County Court of Appeals; No. 87739)

/s/
Thomas J. Moyer
Chief Justice

APPENDIX B

**COURT OF APPEALS OF OHIO,
EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY**

No. 87739

[Filed December 7, 2006]

STATE OF OHIO,	)
PLAINTIFF-APPELLEE	)
	)
vs.	)
	)
CARMILLA FUSSELL,	)
DEFENDANT-APPELLANT	)
	)

JUDGMENT: AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-470891

BEFORE: McMonagle, J., Gallagher, P.J., and Corrigan, J.

CHRISTINE T. MCMONAGLE, J.:

Defendant-appellant, Carmilla Fussell, appeals from the judgment of the Common Pleas Court, rendered after a jury

verdict, finding her guilty of assault on a police officer and sentencing her to 12 months incarceration. For the reasons that follow, we affirm.

The events leading to Fussell's conviction occurred in the early morning hours of July 28, 2005. Middleburg Heights police officer James Duff testified at trial that he stopped Fussell at approximately 3:20 a.m. that morning for speeding. When asked for identification, Fussell gave Duff a false name and told him that she did not have her temporary driver's license with her. Smelling the odor of alcohol, Duff asked Fussell to exit the vehicle and take a field sobriety test, which she failed. Fussell then admitted to Duff that she had lied about her name because there was an outstanding warrant for her arrest on an earlier traffic violation. Duff then arrested Fussell for driving under the influence of alcohol.

Duff testified that he transported Fussell to the Middleburg Heights police station. He took her into the booking room for processing, but Fussell put her head down on the table and would not answer any of his questions. Duff gave Fussell a blanket, because she appeared to be cold, and then completed the booking forms. He offered Fussell an opportunity to make a telephone call to arrange for a bond, but she refused to do so. Duff testified that he then had no choice but to put Fussell in a jail cell.

Duff testified that standard operating procedures of the Middleburg Heights Police Department require the police, when putting a prisoner in a jail cell, to search the prisoner for contraband and then confiscate and inventory the prisoner's personal items, so the prisoner cannot hurt himself or later accuse the department of stealing or losing his property. Duff testified that he asked the female dispatcher at the station to assist Fussell with removing her jewelry and

then left the room. Shortly thereafter, the dispatcher advised him that Fussell would not cooperate.

According to Duff, he returned to the booking room and explained to Fussell that she needed to cooperate with the police because she could not remain in the booking room. Duff testified that he told Fussell that she could keep her street clothes on and "sleep it off" in a jail cell, but she needed to relinquish her jewelry. He told her that if she did not comply, the police would have to hold her down and take the jewelry off.

Duff testified that when Fussell still refused to cooperate, he told the female dispatcher that he would hold Fussell's arm down, so she could take off the bracelets. When he put his hand on Fussell, she became "extremely agitated" and sprang to her feet. Duff ordered her to sit down. When she did not comply, Duff moved in closer and put his arm on her shoulder to get her to sit down on the bench. According to Duff, Fussell then "swung wildly" at him. She managed to get his arm off her shoulder, and then swung at his face, scratching the right side of his face with her fingernail.

Duff was stunned for a moment, but then he grabbed Fussell's arm, pushed her up against the wall and forced her to the ground. With the assistance of the female dispatcher and Officer Paul Meyerholtz, who had come into the booking room after being alerted to the disturbance, the officers handcuffed Fussell, got her jewelry off, and put her in a jail cell.

Officer Meyerholtz testified that when he came in the booking room, he observed Duff and Fussell struggling. When Meyerholtz intervened, Fussell began kicking at both him and Duff.

Fussell's version of what occurred in the booking room differed from that of the officers. She testified that when Duff told her to remove her jewelry, she did not say anything. She assumed that Duff would leave the room, and when he did not, she just sat there. According to Fussell, Duff then said, "since you're not moving, I'll move for you," and yanked on her ponytail and tried to snatch her jewelry off. When Fussell brushed Duff's arm away, he took her arm and forced it behind her back. She then "put her weight down" to make it difficult for him to force her to the ground, so "he kind of was like slinging me around." Fussell admitted that she probably scratched Duff, but testified that she did not intend to do so and that Duff was likely scratched when he was "tossing and slinging [her] around."

On cross-examination, Fussell testified that she had only one glass of champagne before Duff stopped her, but admitted that she pled guilty to the charge of driving under the influence of alcohol. She also admitted that during the field sobriety tests, she had held herself and hopped around in an attempt to convince Duff not to issue a citation because she had to use the bathroom. Fussell further admitted that she was convicted in 2005 of a felony drug charge and passing a phony check.

PROSECUTORIAL MISCONDUCT

In her first and second assignments of error, Fussell claims that she was denied her constitutional right to a fair trial because, during cross-examination, the prosecutor improperly asked her to comment on the truthfulness of Officer Duff's testimony. She objects to the following colloquy:

"QUESTION: And it's your testimony that he [Duff] never left the room, like he told us he left you with a dispatcher, a female dispatcher?

"ANSWER: He never left the room.

"QUESTION: And that's your recollection?

"ANSWER: Yes.

"QUESTION: So Officer Duff then lied to this jury?

"ANSWER: Yes."

Fussell argues that it is improper for a prosecutor to ask a defendant to comment on the veracity of another witness, because such a determination is reserved exclusively to the jury. This court has held, however, that it is within the trial court's discretion to allow the prosecution, on cross-examination, to inquire whether another witness was lying. *State v. McCuller,* Cuyahoga App. No. 86592, 2006-Ohio-302, at ¶s 29-30; *State v. Carter,* Cuyahoga App. No. 84816, 2005-Ohio-2179, at ¶23; *State v. Curry* (Dec. 17, 1992), Cuyahoga App. No. 63438. Accordingly, we find no error.

Moreover, even if we were to conclude that this single question was misconduct, we would not find the error reversible. A prosecuting attorney's conduct during trial does not constitute grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 402-405, *State v. Gest* (1995), 108 Ohio App.3d 248. The touchstone of a due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips* (1982), 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940. The effect of

the prosecutor's misconduct must be considered in light of the whole trial. *State v. Durr* (1991), 58 Ohio St.3d 86, 94.

Here, the prosecutor asked Fussell once whether Officer Duff had lied during his testimony. There is nothing in the record to indicate that this single question deprived Fussell of a fair trial. Rather, as discussed below, it is clear from the testimony presented at trial that there was sufficient evidence to convict Fussell, irrespective of the prosecutor's question.

Appellant's first and second assignments of error are overruled.

RIGHT TO REMAIN SILENT

In her third assignment of error, Fussell argues that the prosecutor's questions during trial about her failure to answer questions at the police station during booking violated her Fifth Amendment right to remain silent after her arrest. We disagree.

In the seminal case of *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, the United States Supreme Court held that the Fifth Amendment prohibits the admission into evidence of statements made by a defendant during custodial interrogation when the defendant has not been advised of certain rights. Subsequently, in *Pennsylvania v. Muniz* (1990), 496 U.S. 582, 110 L.Ed.2d 528, 110 S.Ct. 2638, the Supreme Court adopted the "routine booking question" exception to the requirements of *Miranda*. Under this exception, the police are allowed to ask questions pertaining to biographical matters, even if the accused has already invoked his right to remain silent. In order to fall within this exception, the questions must be part of the routine process normally attendant to arrest, custody, and record

keeping and must not be intended to elicit incriminating statements. 496 U.S. at 601-602.

Here, Officer Duff testified that after he brought Fussell to the police station, he brought her into the booking room "to initiate the booking process and the procedures for the processing of a DUI." The prosecutor's questions about Fussell's refusal to answer these booking questions were proper and Duff's testimony about Fussell's behavior (e.g., putting her head down on the table, ignoring him, refusing to take off her jewelry) was admissible into evidence. Accordingly, we find no violation of Fussell's right to remain silent.

THE STATE'S FAILURE TO CALL THE DISPATCHER TO TESTIFY

During his closing argument, defense counsel argued that if the female dispatcher had been called to testify, she would have corroborated either Fussell's or Duff's testimony regarding what had happened. Defense counsel told the jury that the State could have subpoenaed the dispatcher and then argued:

"Well, if it had been my responsibility to prove this young lady was not guilty, I certainly would have brought her back, but I wouldn't have brought her back before I talked to her, but they obviously talked to her because I don't know when she left this area but the only thing we know for sure is she's not here— "

The trial judge then interrupted defense counsel, stating:

"THE COURT: Wait a minute. Don't testify.

"MR. WILLIS: I'm not testifying.

"THE COURT: There is no evidence that they talked to her. Don't testify, Mr. Willis. Please stick to the evidence in the case."

In her fourth and fifth assignments of error, Fussell asserts that the trial court erred in prohibiting defense counsel from arguing, during summation, that the jury could draw an inference adverse to the State in light of its failure to call the female dispatcher to testify at trial. She further contends that the trial court denied her a fair trial by reprimanding defense counsel when he attempted to make this argument. We disagree.

Counsel may comment during closing argument upon the evidence adduced at trial. *Drake v. Caterpillar Tractor Co.* (1984), 15 Ohio St.3d 346, 347-348. Counsel is given wide latitude in making oral arguments to the jury, but may not make statements in argument which are obviously erroneous, misleading, or not supported by any evidence. Id.

Here, the only testimony regarding the dispatcher's whereabouts came from Officer Duff, who testified that she had remarried and left the department. There is no evidence whatsoever in the record that the prosecutor or anyone else had ever spoken with the dispatcher, much less determined that her version of what happened differed from that of Officer Duff. Accordingly, defense counsel's argument to the jury that the State did not call the dispatcher because "obviously they talked to her" and she would have testified differently than Officer Duff was completely unsupported by the record. Therefore, the trial court did not err in admonishing defense counsel that he could not make such an argument to the jury.

Appellant's fourth and fifth assignments of error are overruled.

CUMULATIVE EFFECT OF THE ALLEGED ERRORS

In her sixth assignment of error, Fussell argues that the cumulative effect of the errors identified in assignments of error one through five so prejudiced her that she was denied due process of law. In light of our resolution of assignments of error one through five, this assignment of error is likewise without merit.

Appellant's sixth assignment of error is overruled.

SUFFICIENCY AND WEIGHT OF THE EVIDENCE

In Fussell's seventh assignment of error, she challenges the sufficiency and manifest weight of the evidence to support her conviction.

A challenge to the sufficiency of evidence supporting a conviction requires the appellate court to determine whether the State met its burden of production at trial. *State v. Thompkins* (1997), 78 Ohio St.3d 380. An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. Id. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

We note that although Fussell moved for acquittal at the close of the State's case, she failed to renew her motion for acquittal at the close of all the evidence. "'A defendant who is tried before a jury and brings a Crim.R. 29(A) motion for acquittal at the close of the State's case waives any error in the denial of the motion if the defendant puts on a defense and fails to renew the motion for acquittal at the close of all the evidence.'" *State v. Brooks*, Cuyahoga App. No. 82174, 2003-Ohio-4813, at ¶15, quoting *State v. Miley* (1996), 114 Ohio App.3d 738, 742; *State v. Fisher*, 148 Ohio App.3d 126, 129-130, 2002-Ohio-3026. Fussell, therefore, waived any challenge to the sufficiency of the evidence.

Nonetheless, we believe the State presented sufficient evidence in this case from which a jury could conclude, beyond a reasonable doubt, that Fussell assaulted Officer Duff. R.C. 2903.13(A), regarding assault, provides that "no person shall knowingly cause or attempt to cause physical harm to another ***." R.C. 2903.13(C)(3) provides that if the victim of the offense is a peace officer, assault is a felony of the fourth degree.

Fussell contends that the State failed to produce evidence that she acted knowingly in assaulting Officer Duff. According to Fussell, although she admitted swinging at Officer Duff, she did not know that he would be injured as a result of her swing, and, therefore, she did not have the requisite culpable mental state to sustain a conviction for assault. We disagree.

A person acts knowingly, regardless of purpose, when she is aware that her conduct will probably cause a certain result or will probably be of a certain nature. *State v. Miller*, 96 Ohio St. 3d 384, 2002-Ohio-4931, at ¶31. "'Probably' is defined as 'more likely than not' or a greater than fifty

percent chance." *Miller v. Paulson* (1994), 97 Ohio App.3d 217, 222.

Here, Officer Duff testified that Fussell "swung wildly" at him. He testified further that after she had successfully dislodged his arm from her shoulder, she attacked him. According to Duff, "[i]t was no longer an attempt on her part to simply free herself of me, she was now coming at me." Officer Meyerholtz testified that when he entered the booking room, he saw Fussell standing in front of Officer Duff, with her arms up "in an aggressive posture" and then he saw her swing at Officer Duff. Meyerholtz testified further that when he intervened, Fussell began kicking at both him and Officer Duff.

We find the officers' testimony, if believed, sufficient to demonstrate that Fussell knowingly attempted to cause physical harm to Officer Duff. She attacked him, even after she had dislodged his arm from her shoulder, and she kicked at both him and Officer Meyerholtz. Such actions indicate knowledge, or even desire, that injury will occur.

While the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenge questions whether the State has met its burden of persuasion. *Thompkins,* supra at 390. When considering an appellant's claim that the conviction is against the weight of the evidence, the reviewing court sits essentially as a "'thirteenth juror' and [may] disagree with the fact finder's resolution of the conflicting testimony.'" *Thompkins,* supra at 387, quoting *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 72 L.Ed.2d 652, 102 S.Ct. 2211. The reviewing court must examine the entire record, weighing the evidence and considering the credibility of witnesses, while being mindful that credibility generally is an issue for the trier of fact to

resolve. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. The court may reverse the judgment of conviction if it appears that the fact finder, in resolving conflicts in the evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins,* supra at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id.

Fussell argues that her conviction was against the manifest weight of the evidence because she did not knowingly attempt to injure Officer Duff. She argues that Officer Duff put his hands on her first and, therefore, she merely acted "reflexively," rather than knowingly. As set forth in the testimony, however, Fussell attacked Officer Duff even after she had managed to dislodge his arm from her shoulder. This testimony adequately supported a reasonable inference that Fussell acted knowingly.

Moreover, Fussell's own testimony damaged her credibility. She admitted that she had given Duff a false name when he stopped her, because she had an outstanding warrant for her arrest. She also admitted that during the field sobriety tests, she held herself and hopped around in an attempt to get Officer Duff to think she had to use the bathroom, but then declined an opportunity to use the restroom at the police station because "they made me wait so long *** I guess I forgot about it." Further, she testified that she only had one glass of champagne before the traffic stop, but admitted that she pled guilty to the charge of driving under the influence of alcohol. In light of these contradictions in Fussell's testimony, the jury did not lose its way in rejecting Fussell's version of

what happened in the booking room and finding her guilty of assault on a peace officer.

Appellant's seventh assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

/s/
CHRISTINE T. MCMONAGLE, JUDGE

SEAN C. GALLAGHER, P.J., and
MICHAEL J. CORRIGAN, J.*, CONCUR

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* Sitting by Assignment: Judge Michael J. Corrigan, Retired, of the Eighth District Court of Appeals.

APPENDIX C

United States Constitution
Amendment I

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution
Amendment IV

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution
Amendment V

Criminal actions – Provisions concerning – Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution
Amendment VI

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Ohio Revised Code § 2901.22 (B)

§ 2901.22. Culpable mental states

* * *

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

* * *

Ohio Revised Code § 2903.13

§ 2903.13. Assault

(A) No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn.

(B) No person shall recklessly cause serious physical harm to another or to another's unborn.

(C) Whoever violates this section is guilty of assault. Except as otherwise provided in division (C) (1), (2), (3), (4), or (5) of this section, assault is a misdemeanor of the first degree.

(1) Except as otherwise provided in this division, if the offense is committed by a caretaker against a functionally impaired person under the caretaker's care, assault is a felony of the fourth degree. If the offense is committed by a caretaker against a functionally impaired person under the caretaker's

care, if the offender previously has been convicted of or pleaded guilty to a violation of this section or section 2903.11 or 2903.16 of the Revised Code, and if in relation to the previous conviction the offender was a caretaker and the victim was a functionally impaired person under the offender's care, assault is a felony of the third degree.

(2) If the offense is committed in any of the following circumstances, assault is a felony of the fifth degree:

(a) The offense occurs in or on the grounds of a state correctional institution or an institution of the department of youth services, the victim of the offense is an employee of the department of rehabilitation and correction, the department of youth services, or a probation department or is on the premises of the particular institution for business purposes or as a visitor, and the offense is committed by a person incarcerated in the state correctional institution, by a person institutionalized in the department of youth services institution pursuant to a commitment to the department of youth services, by a parolee, by an offender under transitional control, under a community control sanction, or on an escorted visit, by a person under post-release control, or by an offender under any other type of supervision by a government agency.

(b) The offense occurs in or on the grounds of a local correctional facility, the victim of the offense is an employee of the local correctional facility or a probation department or is on the premises of the facility for business purposes or as a visitor, and the offense is committed by a person who is under custody in the facility subsequent to the person's arrest for any crime or delinquent act, subsequent to the person's being charged with or convicted of any crime, or subsequent to the person's being alleged to be or adjudicated a delinquent child.

(c) The offense occurs off the grounds of a state correctional institution and off the grounds of an institution of the department of youth services, the victim of the offense is an employee of the department of rehabilitation and correction, the department of youth services, or a probation department, the offense occurs during the employee's official work hours and while the employee is engaged in official work responsibilities, and the offense is committed by a person incarcerated in a state correctional institution or institutionalized in the department of youth services who temporarily is outside of the institution for any purpose, by a parolee, by an offender under transitional control, under a community control sanction, or on an escorted visit, by a person under post-

release control, or by an offender under any other type of supervision by a government agency.

(d) The offense occurs off the grounds of a local correctional facility, the victim of the offense is an employee of the local correctional facility or a probation department, the offense occurs during the employee's official work hours and while the employee is engaged in official work responsibilities, and the offense is committed by a person who is under custody in the facility subsequent to the person's arrest for any crime or delinquent act, subsequent to the person being charged with or convicted of any crime, or subsequent to the person being alleged to be or adjudicated a delinquent child and who temporarily is outside of the facility for any purpose or by a parolee, by an offender under transitional control, under a community control sanction, or on an escorted visit, by a person under post-release control, or by an offender under any other type of supervision by a government agency.

(e) The victim of the offense is a school teacher or administrator or a school bus operator, and the offense occurs in a school, on school premises, in a school building, on a school bus, or while the victim is outside of school premises or a school bus and is engaged in duties or

official responsibilities associated with the victim's employment or position as a school teacher or administrator or a school bus operator, including, but not limited to, driving, accompanying, or chaperoning students at or on class or field trips, athletic events, or other school extracurricular activities or functions outside of school premises.

(3) If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, a firefighter, or a person performing emergency medical service, while in the performance of their official duties, assault is a felony of the fourth degree.

(4) If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation and if the victim suffered serious physical harm as a result of the commission of the offense, assault is a felony of the fourth degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the fourth degree that is at least twelve months in duration.

(5) If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, assault is either a felony of the fifth degree or, if the offender previously

has been convicted of or pleaded guilty to an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

(D) As used in this section:

(1) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(2) "Firefighter" has the same meaning as in section 3937.41 of the Revised Code.

(3) "Emergency medical service" has the same meaning as in section 4765.01 of the Revised Code.

(4) "Local correctional facility" means a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, a minimum security jail established under section 341.23 or 753.21 of the Revised Code, or another county, multicounty, municipal, municipal-county, or multicounty-municipal facility used for the custody of persons arrested for any crime or delinquent act, persons charged with or convicted of any crime, or persons alleged to be or adjudicated a delinquent child.

(5) "Employee of a local correctional facility" means a person who is an employee of the political

subdivision or of one or more of the affiliated political subdivisions that operates the local correctional facility and who operates or assists in the operation of the facility.

(6) "School teacher or administrator" means either of the following:

(a) A person who is employed in the public schools of the state under a contract described in section 3319.08 of the Revised Code in a position in which the person is required to have a certificate issued pursuant to sections 3319.22 to 3319.311 of the Revised Code.

(b) A person who is employed by a nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code and who is certificated in accordance with section 3301.071 of the Revised Code.

(7) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(8) "Escorted visit" means an escorted visit granted under section 2967.27 of the Revised Code.

(9) "Post-release control" and "transitional control" have the same meanings as in section 2967.01 of the Revised Code.

(10) "Investigator of the bureau of criminal identification and investigation" has the same

meaning as in section 2903.11 of the Revised Code.

Ohio Rules of Criminal Procedure
Rule 29

RULE 29. Motion for Acquittal

(A) Motion for judgment of acquittal. The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) Reservation of decision on motion. If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury. If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar

motion has been made prior to the submission of the case to the jury.

[Effective: July 1, 1973.]

Ohio Rules of Criminal Procedure
Rule 33

RULE 33. New Trial

(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;

(5) Error of law occurring at the trial;

(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

(B) Motion for new trial; form, time. Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant

was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

(C) Affidavits required. The causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth, and may be controverted by affidavit.

(D) Procedure when new trial granted. When a new trial is granted by the trial court, or when a new trial is awarded on appeal, the accused shall stand trial upon the charge or charges of which he was convicted.

(E) Invalid grounds for new trial. No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

(1) An inaccuracy or imperfection in the indictment, information, or complaint, provided that the charge is sufficient to fairly and reasonably inform the defendant of all the essential elements of the charge against him.

(2) A variance between the allegations and the proof thereof, unless the defendant is misled or prejudiced thereby;

(3) The admission or rejection of any evidence offered against or for the defendant, unless the defendant was or may have been prejudiced thereby;

(4) A misdirection of the jury, unless the defendant was or may have been prejudiced thereby;

(5) Any other cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial.

(F) Motion for new trial not a condition for appellate review. A motion for a new trial is not a prerequisite to obtain appellate review.

[Effective: July 1, 1973.]